IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.795 OF 2002
IN
SUMMARY SUIT NO.2459 OF 2002

M/s.Gem Star Company Plaintiffs

versus

M/s.Allure and others Defendants

A.Y.Bookwala with N.Engineer i/by Desai & Diwanji for plaintiffs.

Mr.Jaykar i/by Khaitan & Jaykar for defendants.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 20th July 2005

PC :

1. Heard Mr.Bookwala appearing for the plaintiff and Mr.Jaikar for the defendants. The claim in the summary suit is recovery of Rs.80,45,392/- as per particulars of claim (Exhibit-H). The principal sum is Rs.53,23,659/-.

2. It is contended by Mr.Bookwala appearing in support of this Summons for Judgement that the sum of Rs.53,23,659/- is total amount of three bills details of which are mentioned in para 5 of the plaint. A suit is filed as a summary suit to

recover a debt or liquidated demand in money in respect of goods sold, supplied and delivered to the defendants by the plaintiffs. Mr.Bookwala submits that in discharge of the liability the second defendant under cover of her letter dated 3rd September 1999 forwarded to the plaintiff a cheque of Rs.53,23,659/- in full and final settlement of the amount due under the aforesaid three bills. A copy of the letter is annexed as Exhibit-C.

3. The said cheque on presentation for payment was returned with the remark "payment stopped by the drawer" and Mr.Bookwala submits that it is this sum which is sought to be recovered by the present summary suit along with interest.

4. Mr.Bookwala invites my attention to the notice addressed on 14th September 1999 by the advocate for the plaintiffs to which a reply is given on 29th October 1999. He states that the reply contains false statements inasmuch as for the first time a complaint came to be made after two months of the cheque being issued that it is under threat or duress. Mr.Bookwala submits that there is no substance in this contention and it is appropriately dealt with by the plaintiffs by

rejoinder letter dated 29th October 1999. For all these reasons, he submits that this Court should pass a decree in favour of the plaintiffs or in any event appropriate orders securing he principal amount.

5. Mr.Jaikar invites my attention to the affidavit filed in reply and the annexures thereto. The first contention of Mr.Jaikar is that the entire transaction was not of sale of goods as falsely alleged but according to prevailent custom in the trade, polished diamonds are given by the suppliers like plaintiffs for sale to their traders like defendant no.1. However, the articles are despatched on what is popularly called as "Jangad/approval basis", and the sale is effected only if the diamonds are approved by the prospective purchasers. Only when this aspect is complete that appropriate bills are raised and payments are made in respect of the same. However, insofar as present transaction is concerned, all that has happened is that some articles have been given on approval basis in 1999 by the plaintiffs to the defendants. However, the plaintiffs were informed by the defendants within the stipulated period of three months that the articles have not

been approved by the prospective purchasers and in fact have been returned to the plaintiffs. Mr.Jaikar invites my attention to para 9 of the affidavit which contains a positive assertion of the defendants in that behalf. He submits that it is in this light that the entire version set out in the reply to the suit notice must be appreciated. He submits that there is no question of the defendants making any payment within a period of three months, and therefore, neither the letter dated 3rd September 1999 is addressed nor are the cheques handed over voluntarily. On the other hand, the version through out is that the plaintiffs' representative/partner Mr.Prashant Jhaveri forcibly entered the office of defendants and took away some documents. After the plaintiffs partner and his companion left the office, defendants noticed that the cheque book of Citi bank and two cheques therefrom were missing. When the cheques were found missing, immediately on the next date i.e. on 4th September 1999w bankers were requested to stop the payment. The deponent of the affidavit namely defendant no.2 has also disputed her signatures on the letters and more particularly letter dated 3rd September 1999. She has stated that the plaintiffs are

relying upon forged documents. She has also disputed the signature on the cheques.

6. In my view, considering the nature of the controversy and further perusing the documents which are annexed to the plaint, it is clear that the plaintiffs are also relying upon memorandums Exhibits A-1 to A-4. Those are dated 11th April 1999 and 27th April 1999. According to the plaintiffs these are the very articles which are mentioned in the bills. According to them these very articles after the stipulated period have been approved and therefore, invoices/bills were raised and payment in that behalf demanded. It is pointed out that the invoices are dated 1st September 1999 and 2nd September 1999. The cheque is forwarded along with a covering letter of 3rd September 1999. On 14th September 1999 advocate’s letter is sent in which there is absolutely no reference to the articles being sent on approval basis and their distinctive identification. As early as in October 1999 in reply to the plaintiff’s advocate letter the defendant had disputed the signature and had set out their version as reproduced by me hereinabove. In my view, serious issues not only about nature of the transaction and identity of

articles but genuineness of the documents, veracity of signatures arise for consideration. It is well settled that when a defence of such nature is raised, then it is not permissible to invoke summary jurisdiction. Triable issues arising for my consideration of the aforesaid nature would entitle the defendant to unconditional leave to defend. Accordingly Summons for Judgement is dismissed. Unconditional leave to defend. Suit transferred w to the list of commercial causes with usual directions to file written statement, discovery and inspection. It is clarified that all these observations are for the disposal of present Summons for Judgement and shall not influence any other proceedings nor this Court at the final hearing of the suit.

(S.C.DHARMADHIKARI, J.)